

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD VOIGHT and
DICK VOIGHT BUICK, INC.

Plaintiffs-Appellants,

vs.

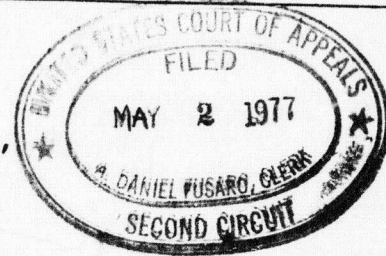
GENERAL MOTORS CORPORATION,
MOTORS HOLDING DIVISION,
GENERAL MOTORS CORPORATION;
BUICK MOTORS DIVISION,
GENERAL MOTORS CORPORATION;
GENERAL MOTORS ACCEPTANCE CORPORATION,
ARGONAUT DIVISION, GENERAL MOTORS CORPORATION;
MARINE MIDLAND BANK, EDWARD HIGGINS,
HARRY FORNOROLA, WILLIAM MONRIAN.

Defendants

and

MARINE MIDLAND BANK,
HARRY FORNOROLA and
WILLIAM MONRIAN

Defendants-Appellees



DOCKET #77-7024

B 81 ✓

NATURE OF PROCEEDINGS: APPEAL

COURT BELOW: UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiffs-Appellants, RICHARD VOIGHT and DICK VOIGHT BUICK, INC. make this Brief in response to the Brief of Defendants-Appellees, MARINE MIDLAND BANK, HARRY FORNOROLA and WILLIAM MONRIAN. For the sake of brevity in this Reply Brief, Plaintiffs will deal only with selected arguments raised by Defendants' Brief. The MARINE MIDLAND Defendants have failed to refute most of the arguments set forth in Plaintiffs' original Brief and Plaintiffs will not repeat such arguments here.

In this Reply Brief, Plaintiffs will deal with the respective issues in the order in which said issues are treated in Plaintiffs' original Brief on this Appeal.

POINT I

PLAINTIFFS' COMPLAINT STATES A CLAIM
AGAINST THE MARINE MIDLAND DEFENDANTS
FOR VIOLATIONS OF SECTIONS 1 AND 2 OF
SHERMAN ANTI-TRUST ACT.

In their Brief, the MARINE MIDLAND Defendants mentioned only a few paragraphs of Plaintiffs' Complaint in support of their assertion that only conclusory allegations are set forth therein. Specifically, Defendants discussed only ¶80 and a small portion of ¶40 in regard to Count X, ¶84 and ¶86 in regard to Count XI, and ¶89 in regard to Count XII. (Defendants' Brief, p. 6-9) Defendants ignored that ¶79, ¶83 and ¶88 of Plaintiffs' Complaint repeated all prior allegations of the Complaint against Defendants in Counts X, XI and XII respectively. (Appendix, p. 34, 36.)

At p.8-11 of their original Brief, Plaintiffs have set forth numerous factual allegations of the Complaint which support their claims under the Sherman Act. The only response made by the Brief of the Marine Midland Defendants to these factual allegations is in a footnote at p. 6 and 7. There, Defendants reproduced a small portion of ¶40 of Plaintiffs' Complaint with the editorial comment that the portion reproduced is insufficient to allege joint action. However, Defendants omitted the following twenty (20) sub-paragraphs of ¶40 in which specific allegations describe in detail the wrongdoing of the MARINE MIDLAND Defendants. (Plaintiffs' Complaint, ¶40 (A)-(T); Appendix p.20-23). When these twenty sub-paragraphs are read in conjunction with the portion of ¶40 reproduced in Defendants' Brief, the joint action on the part of the respective groups of Defendants becomes apparent.

The numerous cases cited by Defendants as pages 10, 11 and 12 of their Brief stand merely for the accepted proposition that conclusory allegations are insufficient to state a claim under the Federal Rules of Civil Procedure. However, in their Complaint, Plaintiffs pleaded numerous factual allegations in addition to the so-called "conclusory" allegations. Therefore, the instant case is easily distinguishable from all of these cited cases since much more than mere conclusory language is set forth in Plaintiffs' Complaint.

It should also be noted that in Heart Disease Research Foundation vs. General Motors Corp., 463 F.2d 98 (2nd Cir. 1972), and in Klebanow vs. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965) excerpts from both of which are cited in support of Defendants' position (Defendants Brief, p. 10-11), the original Complaint was not merely dismissed with prejudice. In the former case, Plaintiffs had served an Amended Complaint and it was this Amended Complaint which was dismissed by the Court with prejudice; in the latter case, the Court granted Plaintiffs leave to serve an Amended Complaint. On this basis alone, these two cases are distinguishable from the instant case in which Plaintiffs' original Complaint was dismissed by the District Court with prejudice. Furthermore, in Heart Disease, the court stated that "no facts are alleged supporting an anti-trust conspiracy" (463 F.2d at 100) and in Klebanow, Plaintiffs apparently pleaded "nothing but the statutory words". (344 F.2d at 299) In the instant case, Plaintiffs have pleaded much more than the Plaintiffs did in those two cases upon which Defendants so heavily rely.

Plaintiffs rely upon Conley v. Gibson, 355 U.S. 41 (1957); Poller vs. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962) and Nagler vs. Admiral Corporation, 248 F.2d 319 (2nd Cir. 1957). Defendants concede at page 9 of their Brief that these cases are appropriate statements of the general criteria required in pleading and Plaintiffs would have the Court decide this Appeal according to these criteria.

Mention should also be made of the cases cited at page 15 of Plaintiffs' Brief. These cases were cited for the proposition that unfair competition may constitute a violation of the Sherman Act. Plaintiffs' reading of the case George R. Whitten, Jr., Inc. vs. Paddock Pool Builders, Inc., 508 F.2d 547, (1st Cir. 1974) cert. den. 421 U.S. 1004 (1975) is that the First Circuit overruled these cases only to the extent that it held that unfair competition did not constitute a per se anti-trust violation. However, the Court did not rule that under no circumstances could unfair competition constitute a violation of Section 1 of the Sherman Act. Thus, the basic "rule of reason" test as to whether facts show the existence of a forbidden restraint or an intent to effect a forbidden restraint upon trade must be applied to this fact situation. Standard Oil Company vs. United States, 221 U.S. 1, 58 (1911). The Whitten case resulted from an Appeal by Plaintiffs after trial on which Judgment was granted for Defendants and on that basis is distinguishable from the fact situation presented herein.

Defendants also seem to raise the issue of their motivation at pages 13 and 14 of their Brief. First of all, whether the

MARINE MIDLAND Defendants had a logical motive for engaging in the illegal conduct alleged is irrelevant to the question of the sufficiency of the factual and legal allegations of Plaintiffs' Complaint. Second, since the invitation has apparently been extended by Defendants to Plaintiffs to suggest a motive, Plaintiffs would speculate that perhaps Defendants might have anticipated deriving some sort of benefit as a result of cooperating with "America's largest corporation", especially in light of the fact that MARINE MIDLAND BANK is well known for its aggressive pursuit of contracts for wholesale and retail financing of automobiles. Once discovery has been commenced, Plaintiffs will undoubtedly have a clearer picture of the motives of the MARINE MIDLAND Defendants. However, there is no requirement that such motives be pleaded for an anti-trust claim to be stated.

The remaining issues regarding Plaintiffs' Sherman Act claims have been adequately covered by Plaintiffs' original Brief and these arguments will not be repeated here. For the above reasons, and for the reasons stated in Plaintiffs' original Brief, Plaintiffs properly stated a claim for violations of the Sherman Act by the MARINE MIDLAND Defendants and the District Court was in error in dismissing that claim.

POINT II

COUNT XVI OF PLAINTIFFS' COMPLAINT STATES VALID CLAIMS AGAINST THE MARINE MIDLAND DEFENDANTS FOR VIO- LATIONS OF THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934.

The questions raised on this point are whether either the stock of DICK VOIGHT BUICK, INC., the GENERAL MOTORS franchise, or both, are securities within the scope of the anti-fraud provisions of the Federal Securities Laws. As can be seen by an examination of Plaintiffs' original Brief and Defendants' Brief, the character of the shares of stock in DICK VOIGHT BUICK, INC. is at issue. Likewise, a question exists as to whether the franchise agreement is an investment contract.

Both of these questions involve issues of fact which were in effect prematurely decided by the District Court by its disposition of the Motion to Dismiss. In regard to the shares of stock, the "economic reality" of the situation is dependent upon whether the facts asserted by Plaintiffs or Defendants are correct. Likewise, the question of whether the franchise agreement was an investment contract depends on resolution of the factual questions of who exerted control over the essential managerial functions of the dealership. Once again an issue of fact exists which cannot be decided on this motion.

Plaintiffs rely upon their original Brief to support their position that both the shares of stock and the franchise agreement are securities. As a result, Plaintiffs have properly stated claims against the MARINE MIDLAND Defendants for violations of the Federal Securities Laws.

POINT III

PLAINTIFFS HAVE STATED A CLAIM AGAINST
THE MARINE MIDLAND DEFENDANTS FOR
CONSPIRACY TO VIOLATE SECTIONS 3 AND 7
OF THE CLAYTON ANTI-TRUST ACT.

Plaintiffs rely upon their original Brief on this point.

POINT IV

PLAINTIFFS' COMPLAINT ALLEGES CONSPIRACY
BY THE MARINE MIDLAND DEFENDANTS TO
VIOLATE FEDERAL STATUTES AND THESE CLAIMS
ARE SUFFICIENT AS A MATTER OF LAW.

Defendants appear confused because Count IX of Plaintiffs' Complaint, dealing with violations of the Automobile Dealer Day in Court Act, is directed only toward GENERAL MOTORS. However, Count XV of Plaintiffs' Complaint is directed towards all Defendants including the MARINE MIDLAND Defendants. The whole thrust of Count XV is that all Defendants conspired to violate various Federal Statutes. Although the MARINE MIDLAND Defendants concededly did not have the capacity to violate the Dealer Day in Court Act, it does not necessarily follow that they did not have the capacity to conspire with the GENERAL MOTORS Defendants and to assist said GENERAL MOTORS Defendants in their violations of that Statute.

Plaintiffs would also note that this Count alleges conspiracy to violate the anti-trust laws and Federal Securities Laws, as well as conspiracy to violate the Dealer Day in Court Act. (See Plaintiffs' Original Brief at p.31).

As to the remainder of this Point, Plaintiffs rely upon their original Brief.

POINT V

THE COURT BELOW ERRED IN DISMISSING
PLAINTIFFS' COMPLAINT WITHOUT GRANTING
PLAINTIFFS LEAVE TO AMEND THE COMPLAINT.

Under this Point Plaintiffs are asking for alternative relief. Should this Court find that the District Court was correct in dismissing Plaintiffs' Complaint, Plaintiffs nevertheless request this Court to grant them leave to serve an Amended Complaint and remand the matter to the District Court for further proceedings. Plaintiffs also contend that even though leave to Amend was not specifically requested by Plaintiffs in the District Court, nevertheless, that Court should have exercised its discretion and granted Plaintiffs such relief. Plaintiffs concede that the better practice in the Court below would have been to specifically request alternative relief on the original motion; however, Plaintiffs' failure to specifically request relief which is commonly given as a matter of course on such a motion should not forever bar Plaintiffs for pursuing their claims against the MARINE MIDLAND Defendants.

Defendants contend that Plaintiffs could have amended their Complaint as of right, up until the date that the lower Court dismissed it against the MARINE MIDLAND Defendants. Exactly what this would have accomplished, except for mooting Defendants' motion, is not clear. Plaintiffs contended below and contend here that their original Complaint is sufficient to state Federal claims against the MARINE MIDLAND Defendants. Amendment is alternative relief requested by Plaintiffs and had Plaintiffs amended prior to the decision on Defendants' motion, they would have conceded on the issue of the sufficiency of the original Complaint.

Defendants' suggestion that Plaintiffs should have moved pursuant to Rule 59(e) or Rule 60(b) of the Federal Rules is likewise unsatisfactory. While Plaintiffs might have obtained leave to serve an Amended Complaint pursuant to these Rules (and there is some question as to whether the grounds set forth in these rules would allow such a motion), this would not have satisfied Plaintiffs' need to have the sufficiency of the original Complaint ruled upon by this Court. It should be reiterated that Plaintiffs seek to serve an Amended Complaint only if this Court affirms the District Court's dismissal of the original Complaint.

Defendants cite Murphy vs. Kodz, 351 F.2d 163 (9th Cir. 1965) in support of their position that Plaintiffs should not have been and should not be granted leave to amend. However, the Murphy case is hardly identical to the instant situation. In Murphy, certain Defendants raised the question of whether the action should have been remanded to the State Court only after Judgment on the merits had been entered against them at trial. It is in this context that the excerpt used by Defendants in their Brief must be considered. Immediately following the quoted except, the Murphy court stated that "To hold otherwise would encourage litigants to wager on their success on the merits, and if they lost permit them to call the contest a nullity." 351 F.2d at 168.

Obviously, the distinctions between Murphy and the instant case give the statement quoted by Defendants limited utility in determining whether leave to amend should have been or should be granted to Plaintiffs.

To summarize Plaintiffs' position on this issue, the Plaintiffs contend that (1) the District Court in its discretion should have allowed Plaintiffs to amend their Complaint and (2) in any event, if this Court should affirm the District Court's dismissal of Plaintiffs' Complaint against the MARINE MIDLAND Defendants, this Court should nevertheless remand this action to the District Court with leave to Plaintiffs to serve an Amended Complaint as to the MARINE MIDLAND Defendants.

CONCLUSION

For the above reasons and for the reasons set forth in Plaintiffs' original Brief, Plaintiffs-Appellants request the following relief from this Court:

1. That this Court reverse the District Court's dismissal of Plaintiffs' Complaint with prejudice and rule that Plaintiffs' Complaint has properly stated Federal claims against the MARINE MIDLAND Defendants.

2. In the alternative, that this Court remand this action to the District Court with instructions that Plaintiffs be given leave to serve an Amended Complaint or at least the opportunity to move for leave to serve an Amended Complaint.

3. Such other and further relief as to the Court may seem just and proper including costs of this Appeal pursuant to Rule 39 of the Federal Rules of Appellate procedure.

Respectfully submitted,

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1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 RICHARD VOIGHT et al.,

4 Plaintiffs-Appellants

5 vs.

Docket #77-7024

6 GENERAL MOTORS CORPORATION, et al.

CERTIFICATE OF SERVICE

7 Defendants,

8 and

9 MARINE MIDLAND BANK, et al.,

10 Defendants-Appellees.
11

12 I HEREBY CERTIFY that a true copy of the attached
13 APPELLANTS' REPLY BRIEF was mailed, postage prepaid, this
14 28th day of April, 1977 to HARTER, SECREST & EMERY, 700 Midtown
15 Tower, Rochester, New York 14604 and to PHILLIPS, LYTLE, HITCH-
16 COCK, BLAINE & HUBER, 3400 Marine Midland Center, Buffalo,
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